

WILLIAM WINN, JAMES ROSS ET AL.

vs.

WILLIAM J. ALBERT AND WIFE  
ET AL.

} MARCH TERM, 1851.

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[STATUTE OF FRAUDS—RULES OF EVIDENCE—EFFECTS OF ANSWER—CHANCERY PRACTICE.]

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THERE can be no doubt that a court of equity will enforce the specific performance of a contract within the statute of frauds, not in writing, when it is fully set forth in the bill, and is confessed by the answer of the defendant, and the statute is not relied upon as a defence.

The only ground upon which relief in such cases is granted, is, that where the defendant confesses the agreement and does not insist upon the statute, he is supposed to have waived it as a defence.

The answer of a defendant confessing a *parol* agreement charged in the bill cannot be regarded as a compliance with the statute : for though he confesses the agreement, he may still rely upon the statute as a defence.

The answer of one defendant, in chancery, is not evidence against a co-defendant claiming title under the former, for the reason that the party against whom the answer is proposed to be read would be deprived of the benefit of a cross-examination.

The answer, when responsive to the bill, though uncontradicted, cannot be taken to establish any thing in bar of the relief prayed, which *parol* testimony would not be admitted to prove, for it is as *evidence only* that it is received.

As a general rule, no claim should be stated or noticed by the Auditor, unless filed in the cause in which the fund is to be distributed ; but when he is referred to claims filed in another cause by some sufficient designation, and is instructed to state them, there can be no reason why he should not do it, as it would prevent the necessity of shifting claims, or the vouchers of claims, from one cause to another, and thereby obviate much inconvenience.

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[The first order passed in this case, and which was affirmed by the Court of Appeals, has already been reported, (see page 42 of the February and March number,) and the questions now decided arise upon exceptions filed to the accounts of the Auditor disposing of the proceeds of the "Wheatfield Inn," all of which, with the facts upon which they depend, are fully stated in the opinion.]